Nos. 87-253; 87-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DR. OTIS R. BOWEN, JR., Secretary of the Department of Health and Human Services,
Petitioner,

—and—

SAMMIE J. BRADLEY; KATHERINE K. WARNER; and UNITED FAMILIES OF AMERICA,
Petitioner-Intervenor.

—vs.—

CHAN KENDRICK; REVEREND ROBERT E. VAUGHN; REVEREND LAWRENCE W. BUXTON; DR. EMMETT W. COCKE, JR.; DR. SHIRLEY PEDLER; REVEREND HOMER A. GODDARD; JOYCE ARMSTRONG; JOHN ROBERTS; and THE AMERICAN JEWISH CONGRESS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

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EDITOR'S NOTE

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ON WRIT OF CERTIORARI
TO THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF NEW YORK COMMITTEE
FOR PUBLIC EDUCATION AND RELIGIOUS
LIBERTY *

INTEREST OF THE AMICUS

The New York Committee for Public Education and Religious Liberty (PEARL), founded in 1966, is an association of organizations and individuals committed to the preservation of the dual principle of the separation of church and state and the free exercise of religion, as they

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PEARL organizations joining in this brief are listed in the Appendix.

relate to or affect education in the state of New York. To effectuate its purpose it has instituted suits, submitted briefs amicus curiae, testified before federal and state legislative bodies and engaged in general education programs for the community.

Because New York PEARL and its constituents deem direct financial contributions by the Federal Government to religious organizations to enable them to propagate their values among adolescents to be a serious threat to the principle of the separation of church and state, it respectfully submits this brief amicus curiae with the consent of all parties.

QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed to a single

question: Is it an additional ground for affirming the district court's decision that the challenged statute, the Adolescent Family Life Act of 1981, [1] as enacted and applied, has a religious purpose and hence is subject to invalidation under the first part of the purpose-effect-entanglement test of constitutionality of the First Amendment to the Constitution? [2] In respect to effect and entanglement, New York PEARL adopts and submits as its own the amicus curiae brief of the National Coalition

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1. 42 U.S.C. 300z-300z-10. The Act is hereinafter referred to as AFLA.

2. The First Amendment reads in part: "Congress shall make no law respecting an establishment of religion..."

for Public Education and Religious Liberty, of which New York PEARL is a constitutent member.

ARGUMENT

A. The Purpose Test

Prior to this Court's decision in McGowan v Maryland, [3] upholding the constitutionality under the First Amendment's Establishment Clause of compulsory Sunday closing laws, the standard of validity was the no-aid-to-religion con-

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3. 366 U.S. 420 (1961).

cept. 4/

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4. It is difficult to uphold the validity of AFLA under that concept, first expressed in Everson v Board of Education, 330 U.S. 1 at 15 (1947) (tax-supported transportation to parochial schools) and later applied in many cases such as McCollum v Board of Education, 333 U.S. 203 at 210-211 (1948) (religious instruction in public schools). In those cases the Court said: "The 'establishment of religion' clause of the First Amendment means at least tnis: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

In McGowan the closing words of the Court's opinion read:

> Finally, we should make clear that this case deals only with the constitutionality of §521 of the

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Continuation of footnote 4

No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

> Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose --evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect--is to use the State's coercive power to aid religion. 5/

In Lemon v Kurtzman, 6/ the Court added entanglement to the purpose-effect duality so that it now became the purpose-effect-entanglement trilogy. In the present case the district court ruled that the statute did not violate the purpose aspect of the Lemon v Kurtzman mandate. We submit that, as we will seek to show, it erred in so ruling under the

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5. 366 U.S. at 453 (emphasis added).

6. 403 U.S. 602 (1971).

relevant constitutional law as it then stood. But, perhaps even more important, we submit that even if that were not so, this Court's ruling in the most recent relevant case, Edwards v Aguillard, 7/ handed down on June 19, 1987, mandates a holding that the challenged statute fails under the First Amendment's purpose provision.

B. Religion As an Instrument of Government

The Framers of the Constitution and the First Amendment, were concerned with more than the capture of the state by a church. They were equally alert to the dangers inherent in the manipulation of religion by the government. In

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7. ___U.S.___, 107 S. Ct. 2573 (1987).

prohibiting laws "respecting an establishment of religion," the Framers sought to protect churches from the state as well as the state from the churches.

This twofold aspect of Establishment is presented in James Madison's Memorial and Remonstrance. In opposing a bill to provide public funds to propagate religious teaching, Madison wrote:

> Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation. 8 /

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8. Memorial and Remonstrance Against Religious Assessment, par. 5, (1785) reprinted in Everson v Board of Education, 330 U.S. 1, 67 (1947) (Rutledge, J., dissenting).

Use of religion as "an engine of civil policy" is thus as abhorrent to the American tradition as is the use of govrnment as an engine of religious faith or, as in the words of the great nineteenth century jurist Jeremiah S. Black: "The manifest object of the men who framed the institutions of this country, was to have a State without religion and a Church without politics --that is to say, they meant that one should never be used as an engine for the purposes of the other....For that reason they built up a wall of complete and perfect partition between the two." 9 /

The fatal defect of the Adolescent

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9. Essays and Speeches 53 (New York 1885). emphasis added.

Family Life Act is its disregard of this two-fold prohibition. Indeed, the statute is replete with explicit avowals of its intent to use religion as a tool to achieve its goals. In its statement of purpose, the Act avers that the problems it seeks to solve "are best approached through a variety of integrated and essential services provided...by [inter alia]...religious "services encouraged by the Federal Government...should emphasize the provision of support by...[inter alia] religious...organizations..." 11/ This explicit determination to use religion to achieve its goals, we suggest, is an

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11. 42 U.S.C. § 300z(a) (10)(C).

illegitimate statutory purpose under the First Amendment. The court below held that AFLA passed muster under the purpose test because it incorporates some secular values. 12/

But, as the Framers of our Constitution well knew, even obviously unacceptable establishment of one faith as the nation's official religion could be defended by secular arguments. Thus, Blackstone contended that "the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state," 13/ and

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12. Kendrick v Bowen, 657 F. Supp. 1547 at 1558-60 (1987).

13. 4 W. Blackstone, Commentaries #43.

asserted that "all confidence in human veracity, must be weakened by apostacy, and overthrown by total infidelity." 14/ The encouragement of veracity is undoubtedly a secular goal, but that would not alter the conclusion that a statute enacted to assure "the preservation of Christianity" would have an improper religious purpose. Similarly when the Constitution was being written, secular objectives were advanced to support religious tests for public office. Oliver Ellsworth, later to be Chief Justice of this Court, noted the unacceptable argument "that one who believes these [religious] great truths,

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14. Id. at #44.

will not be so likely to violate his obligations to his country, as one who disbelieves them; we may have greater confidence in his integrity." 15/ Loyalty to one's obligations to the United States is certainly a secular goal; yet relying on a religious oath to achieve that goal violates Article VI (3) of the Constitution and the Establishment Clause of the First Amendment. 16/ So also is assurance that governmental and state employees will be more likely to be honest if they believe in God, for that

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15. Letters from a Landholder No. 7 (1787), quoted in 1 A. P. Stokes, Church and State in the United States 535 (1961).

16. Torcaso v Watkins, 367 U.S. 488 (1961).

is why witnesses at trials say "So help me God."

Here, too, no matter how "secular" the aims of AFLA might be, the calculated intent to use religion to further those aims is an unacceptable purpose under the Establishment Clause. It does not matter that religions choose voluntarily to accept government funds; the state may no more seduce churches to its service than it may compel them. Nor can the statute be saved on the theory that, in the lower court's words, "religious organizations can play a vital role in furthering secular values." 17/ It is one thing to finance secular functions such as curing

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17. 657 F. Supp. at 1559 (1987).

the ill which happen to be performed by religious associations, for they are exactly the same as if they were performed by licensed physicians and nurses in secular hospitals. 18/ But here it is precisely the religious nature of the organizations, and the desire to use their faith and values to further the goals of the statute, that is at the heart of AFLA. Insofar as the Act "employs religion as an engine of civil policy" it violates the First Amendment to the Constitution.

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18. See, e.g., Bradfield v Roberts, 175 U.S. 291 (1899), (hospital corporation organized under the auspices of the Roman Catholic Church is still a secular corporation so long as its activities in caring for the ill are purely secular).

C. Government as an Instrument of Religion

AFLA also falls afoul of the Establishment Clause for its promotion of specific religious doctrines. This is the more familiar facet of the purpose test: the Act is aimed at furthering particular beliefs.

There is no problem here of discovering legislative intent; AFLA is clear on its face. It aims at the "prevention of adolescent sexual activity and adolescent pregnancy," and "emphasize[s] the provision of support by [inter alia]...religious...organizations...in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations." 19/ Grants are expressly authorized to further these purposes. 20/

We recognize (as did plaintiffs below) that it can be argued that eliminating adolescent sexual activity and pregnancy may have a secular goal as well as a religious one. 21/ That a principle may be endorsed for secular reasons, however, does not transmute the values of those who hold it for religious ones. There is a legally cognizable difference between the rejection of social values by a Thoreau and their rejection by the Old

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19. 42 U.S.C. § 300z(a)(10).

20. 42 U.S.C. § 300z-2.

21. Kendrick v Bowen, 657 F. Supp. at 1559 (1987).

Order Amish. 22/ Similarly, there is a clear difference between the secular arguments for endorsing the goals of AFLA and the religious ones. Financing the former raises no difficulties under the Establishment Clause, but the problems with financing the latter are insuperable.

Thus, for example, AFLA concerns the "prevention of adolescent sexual activity and adolescent pregnancy." 23/ Most religions, however, consider marriage to be a sacrament, and therefore distinguish strongly between premarital and post-marital sexual activity and pregnancy,

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22. See Wisconsin v Yoder, 406 U.S. 205, 216 (1972).

23. 42 U.S.C. § 300z-3(a)(1)(3).

whether by adolescents or others. It is difficult to believe that religious associations, funded by AFLA and assisting adolescents and their families in dealing with these issues, could or would provide purely "secular" counsel unaffected by their doctrinal views of the significance of marriage; their faith would inevitably inform their actions. It follows from this that the intent to finance such actions with public funds has the inevitable and impermissible purpose of advancing religion.

We submit that this Court's decision in Stone v Graham 24/ would require a determination of invalidity in the

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24. 449 U.S. 39 (1980).

present case even if the challenged statute were held not to be violative of the effect-entanglement provisions. In that case, the Court ruled violative of the Establishment Clause's purpose provision a Kentucky statute requiring posting of the Ten Commandments on the wall in each public school classroom in the state. The statute required that

> in small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States. 25/

The Court there acknowledged that

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25. Id. at 39 n. 1.

some of the precepts of the Ten Commandments, such as the prohibitions against murder and stealing, have secular counterparts. But when put forth in a religious form, the purpose was religious, the small print to the contrary notwithstanding. This holding clearly demonstrates that it is the real purpose of a statute, not its formal guise, that is dispositive.

The Court in that case ended its opinion with the following sentence: "We conclude that Ky. Rev. Stat § 158.178 (1980) violates the first part [i.e., the purpose part] of the Lemon v Kurtzman test, and thus the Establishment Clause

of the Constitution." 26/ In the light of that holding the Court found it unnecessary to consider the effect or entanglement aspects of the Establishment Clause.

The importance of looking to the true purpose of a statute is well ex hibited in the case of AFLA. Prior to AFLA's enactment in 1981, 27/ There already was a law designed to deal with adolescent pregnancies in a purely secular fashion. 28/ The major change made

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26. Id. at 42-43 (footnote omitted.)

27. Pub. L. 97-35, Title 20, 95 Stat. 578 (1981).

28. Pub. L. 95-626, Title 6, 92 Stat. 3595 (1978).

in the 1981 version was to provide for the involvement of religious organizations. In evaluating the purpose of the religious grants in AFLA, therefore, it is this change, and not the reenactment of the earlier law, which is crucial.

Also relevant to a determination of Establishment Clause violation by reason of purpose is the Court's decision in Epperson v Arkansas. 29/ There it held unconstitutional a statute making it unlawful for public school teachers "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" or to use textbooks that teach that doctrine.

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29. 393 U.S. 97 (1968).

In reaching that decision it quoted the statement from the Schempp decision [30] that the Establishment Clause renders unconstitutional any statute that has as its purpose or effect the advancement or inhibition of religion. The antecedent of the Arkansas statute, the Court said, was the Tennessee "monkey law," which "candidly stated that its purpose was to make it unlawful to teach any theory that denies the story of the Divine creation of man as taught in the Bible, and to teach instead that man has

30. Id. at 107, quoting Abington School District v Schempp, 374 U.S. 203, 222 (1963).

descended from a lower order of animals."

"Perhaps," the Court there continued, "the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine Creation of man' as taught in the Bible, but there is no doubt that the motivation [i.e. purpose] of the law was the same: to suppress the teaching of a theory, which it was thought 'denied' the divine creation of man." [31]

No less relevant to the case before this Court is that of Karcher v May. [32] It involved a challenge

31. 393 U.S. at 107.

32. 572 F. Supp. 1561 (...1983).

under the Establishment Clause of a New Jersey statute providing that principals and teachers in public elementary and high schools should "permit students to observe a one-minute period of silence to be used solely at the discretion of the individual student, before the opening exercise of each school day for quiet and private contemplation or introspection."

The district court had held that the statute violated the Establishment Clause because its purpose was religious rather than secular, because it both advanced and inhibited religion, and because it fostered excessive government entanglement with religion. The court of appeals, in affirming the decision, held thathe statute did not promote or

inhibit religion and would not foster excessive entanglement between government and religion, but affirmed the district court's conclusion that the statute violated the Establishment Clause for lack of a valid secular purpose. 33/ This Court's most recent determination relating to purpose is found in Edwards v Aguillard 34/ handed down in June of 1987. The issue in that case was the constutionality under the Establishment Clause of a Louisiana law that forbade the teaching of the theory of evolution in public elementary and secondary

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33. May v Cooperman, 780 F. 2d 240 (3rd Cir. 1985); appeal dismissed for want of jurisdiction, sub non Karcher v May, ___ U.S. ___, 108 S. Ct. 388 (1987).

34. ___ U.S. ___, 107 S. Ct. 2573 (1987).

schools unless it was accompanied by instruction in the theory of creationism. The statute was officially entitled "Balanced Treatment of Creation-Science and Evolution-Science Act," but was popularly known as the "Creationism Act" just as the statute in the present case is known to many as the "Chastity Law," and so too, as in the present case, it determined the issue on a motion for summary judgment. There are other similarities between the two cases, but our concern in this brief relates only to the correctness of the district court's ruling on the applicability of the purpose aspect of the purpose-effect-entanglement test in determining validity or invalidity under the First Amendment's

Establishment Clause. Because it is so much in point, and because it was decided after the district court handed down its decision in the present case, we take the liberty of quoting somewhat substantially from the Edwards opinion:

> While the Court is normally deferential to a State's articulation of a secular purpose, it is required that statement of such purpose be sincere and not a sham in Wallace [v Jaffree]: "It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice."...
>
> These same historic and contemporaneous antagonisms, between the teachings of certain religious denominations and the teaching of evolution are present in this case. The preeminent purpose of the Louisiana legis-

lature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term "creation science" was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act....

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. As in Epperson, the legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator. The "overriding fact" that confronted the Court in Epperson was "that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with...a particular interpretation of the Book of Genesis by a particular religious group." Similarly, the

Creationism Act is designed either to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. The Establishment Clause, however, "forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment. 35/

It is obvious that the present case has important features in common with these earlier decisions. The focus of AFLA, as in the earlier cases, is on

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35. Id. at 2579, 2581-82 (emphasis added) (footnotes omitted).

children, who are more susceptible to the induction of religious values than older persons. 36/ Moreover, as in the earlier cases, ostensible references to secular purposes in other parts of the law do not disguise the essentially religious nature of the challenged part of the statute.

The court below did not have the benefit of the Edwards decision. For the rest, it rejected the controlling precedents because "at most, only the language permitting the involvement of religious organizations was motivated by religious considerations. This, however, does not mean that the entire AFLA was

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36. See id. at 2577.

motivated wholly by religious considerations, as it would have to be in order to find that the AFLA has no valid secular purpose." 37/ But, we submit, if the involvement of religious institutions had as its purpose the advancement of religious doctrines, as it necessarily did, then those provisions are constitutionally infirm, regardless of the motivation behind other parts of AFLA. The fact that Commandments VI through X of the Ten Commandments are purely secular, did not make constitutional the posting of all ten in the public schools. 38/ The strictures

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37. 657 F. Supp. at 1559 (emphasis in original).

38. Stone v Graham, 449 U.S. 39 (1980).

of the First Amendment, we submit, are not so easily evaded.

Finally, we submit that invalidation of 42 U.S.C. § 300z-300z(10) at least insofar as it involves religious institutions, 39/ is required if its purpose was to advance some religions and not others. The Court's reference to "certain religious sects" in Edwards in the quoted paragraph indicates this quite clearly. The fact that three of the eight plaintiffs in the present case are themselves clergymen whose conscience impelled them not only to refrain from participating as a beneficiary in the

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39. We take no position as to the possible severabiliy of the religion provisions so as to avoid a judgment invalidating the entire statute.

statutary distribution of federal funds, but to oppose its enactment (a fact well known to Congress when the measure was under consideration) requires a determination that the statutory purpose was to aid "certain religious sects" against the conscience of others.

CONCLUSION

For the foregoing reasons, AFLA violates the purpose test of the Establishment Clause of the United States Constitution, and the decision of the lower court should be affirmed on that ground as well as the effect and entanglement grounds.

Respectfully submitted,

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February, 1988

APPENDIX

American Ethical Union
Americans for Democratic Action
Americans for Religious Liberty
Aspira
Association of Reform Rabbis of New York City and Vicinity
B'nai B'rith
Community Church of New York
Council of Churches of the City of New York
Council of Supervisors and Administrators
Episcopal Diocese of L.I., Committee on Social Concerns and Peace
Humanist Society of Greater New York
Jewish War Veterans, New York Department
Monroe Citizens for Public Education and Religious Liberty
National Service Conference of The American Ethical Union
New York Civil Liberties Union
New York Federation of Reform Synagogues
New York Jewish Labor Committee
New York Conference of the Society for Ethical Culture
New York Society for Ethical Culture *
New York State Congress of Parents and Teachers
New York State United Teachers
Public Education Association
Union of American Hebrew Congregations, New York State Council
United Americans for Public Schools
United Community Centers

United Federation of Teachers
United Parents Association
United Synagogue of America, New York
Metropolitan Region
Women's City Club of New York
Workmen's Circle, New York Division

* American Humanist Association, though not a member of NY Pearl, joins in the submission of this brief.